

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:06-cr-194

THIS MATTER comes before the Court on the defendant's Motion to Vacate Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (Doc. No. 44).

The defendant claims the criminal judgment against him (Doc. No. 35) is void for lack of jurisdiction on the theory that 21 U.S. C. § 846 does not allege a criminal offense. (Id. at 2). A defendant may not attack a criminal conviction using the rules of civil procedure. United States v. Leake, 96 F. App'x 873 (4th Cir. 2004) (citing United States v. O'Keefe, 169 F.3d 281, 289 (5th Cir. 1999) and United States v. Mosavi, 138 F.3d 1365, 1366 (11th Cir. 1998)); see also United States v. Breit, 754 F.2d 526, 530 (4th Cir. 1985) ("there is no provision similar to FRCP 60(b) for relief after final judgment or order in effect for federal criminal cases"). Additionally, the Fourth Circuit has found that a civil Rule 60(b) motion in a criminal case may be dismissed as untimely if not brought within the time to file a notice of appeal following entry of the judgment. United States v. McKelver, 225 F. App'x 185, 186 (4th Cir. 2007). Here, the motion was filed years after the appeal was decided.¹ Therefore, the motion must be denied.

Even if the Court were to consider the merits of the defendant's claim under Rule 60(b), the Court would reject it. First, the defendant was not convicted simply of a violation of § 846; the indictment and judgment both reference 21 U.S.C. § 841(a)(1) (making it unlawful to possess

¹The Fourth Circuit’s opinion was issued on March 23, 2009. (Doc. No. 41). The motion was signed by the defendant on February 14, 2012. (Doc. No. 44: Motion at 9).

with intent to distribute a controlled substance). Second, the Fourth Circuit has affirmed convictions for the same offense. United States v. Pratt, 351 F.3d 131, 134-7 (4th Cir. 2003) (defendant validly convicted of attempted violations of drug trafficking laws in violation of §§ 841(a)(1) and 846).

IT IS, THEREFORE, ORDERED that the defendant's Motion to Vacate (Doc. No. 44) is **DENIED**.

The Clerk is directed to send copies of this Order to the parties, including Devon Ramus Strudivant, Fed. Reg. No. 20847-058, Federal Medical Center, P.O. Box 14500, Lexington, Kentucky, 40512-4500.

Signed: February 29, 2012



Robert J. Conrad, Jr.
Chief United States District Judge
